No. 98-10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JEFFERSON COUNTY, ALABAMA,
Petitioner,

v.

WILLIAM M. ACKER, JR. and U.W. CLEMON,
Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS UNITED STATES DISTRICT JUDGES WILLIAM M. ACKER, JR. AND U.W. CLEMON

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This case raises the question whether Jefferson County, Alabama has the right under the United States Constitution to require that respondents and other federal judges appointed pursuant to Article III of the Constitution be licensed by the County in order to perform their federal judicial functions. Petitioner and the United States as its supporting *amicus* contend that the Jefferson County licensing ordinance merely imposes an ordinary income tax and that respondents must pay the license fee, also referred to as a "privilege tax," just as they pay income taxes to the State of Alabama. The Eleventh Circuit, twice sitting *en banc*, rejected petitioner's argument because it correctly understood that the County was attempting

to license federal judges, not tax their incomes, and that its licensing law violates the Constitution. In addition, the court of appeals properly turned aside petitioner's claim that the district court was barred by the Tax Injunction Act from deciding the merits of this case so that respondents would not be forced to litigate their constitutional claims in the state courts of Alabama.

STATEMENT OF THE CASE

1. Factual and Statutory Background

This case began in December 1992 with the filing of two separate complaints in the Small Claims Division of the District Court for the Tenth Judicial Circuit for the State of Alabama in Jefferson County. In these actions, petitioner Jefferson County sought to recover what it calls "license fees" that it claims are owed by respondents, plus interest and penalties, for the privilege of engaging in their occupation as United States District Judges for the Northern District of Alabama, insofar as they do so in Jefferson County. As judicial officers of the United States, respondents' defense was that the licensing system violated the United States Constitution because it interfered with carrying out their official judicial functions and because it diminished their compensation in violation of Article III. Accordingly, they removed the cases to the United States District Court for the Northern District of Alabama pursuant to 28 U.S.C. § 1442(a)(3), where the cases were consolidated before Senior District Judge Charles A. Moye of the Northern District of Georgia, sitting by designation.

The statutory basis for petitioner's claims is Jefferson County Ordinance 1120 of 1987, enacted after respondents had been appointed to their judicial offices. Pet. App. 129-39. Under Alabama law, cities and counties have no authority to

impose an income tax (*id.* at 84 n.2), but they are permitted by Alabama Act No. 406, approved September 7, 1967, to enact "a business or privilege tax" for those persons who are not otherwise required by Alabama law to pay such a tax to the State. Pet. App. 126. Under Ordinance 1120, which specifically applies to all federal and state officials, the amount of the tax is one half of one percent of the gross receipts or compensation paid *or owea* to the licensee for services performed in Jefferson County. No tax is required to be paid on other income, such as dividends, interest, or profits from sales of stock or other property. But the tax must be paid, whether or not the money is received, since, under section 1(F), compensation includes money that "a person receives or is entitled to receive from . . . his employer. . .." Pet. App. 131.

Under 28 U.S.C. § 132, there are seven authorized active judges in the Northern District of Alabama, which is headquartered in Birmingham in Jefferson County. However, these judges also sit from time to time in the six other Divisions in the Northern District, which, in the case of respondent Clemon, results in approximately one-third of his time being spent outside Jefferson County. Pet. App. 116. Salaries for District Judges were $133,600 per year when this case was filed, 28 U.S.C. §§ 135, 461 (1994 & Supp. 1998), and thus the amount at issue can be no more than $668 per judge and is almost certainly less since most, if not all, of the judges have judicial activities outside Jefferson County that constitute a significant portion of their caseloads. Furthermore, for reasons that are not apparent from the face of Ordinance 1120, senior judges, such as respondent William Acker, are not required to pay a license fee once they take senior status, but they continue to be liable for fees for the time when they were active judges.

Under the Alabama statute that permitted petitioner to enact Ordinance 1120, a county may not impose such a tax if "a license or privilege tax" is otherwise required by the State. Pet. App. 127, § 4. Included in the exemption actually enacted by petitioner (Pet. App. 130, § 10 (B)) are approximately 140 categories of individuals and businesses listed in Chapter 12, Article 2 of Title 40 of the Alabama Code. Pet. App. 143-46. Petitioner has chosen to reprint the text of only 23 of the exemptions (*id.* at 161-75), but they are reasonably representative of the whole. For purposes of this litigation, the contrast in annual payments required by the State among those 23, and those required of respondents by petitioner, is most stark for accountants and architects ($25)[48 & 43], engineers ($20)[99], embalmers ($10)[98], manicurists ($5)[124], and doctors ($25, $10, or $5 depending on the size of the city where they work)[126].[1] Since respondents were licensed attorneys in Alabama before they became federal judges, the most telling exemption for them is that enjoyed by members of the Alabama Bar. Instead of paying a "license fee" of one half of one percent of their gross receipts to Jefferson County, lawyers working in Jefferson County pay license fees of only $250 per year to the State of Alabama, no matter how much they earn.[2]

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[1] Numbers in brackets in text and in note 2 correspond to paragraphs in Chapter 12.

[2] The pattern of license pricing is difficult to discern, but is clearly not based on actual, or in most cases, potential income. Beauty parlors are charged $10 per year, plus $6 or $4 per operator depending on the size of the community [61], whereas barbers are charged $2.50 per chair [58]. Fruit dealers pay license fees of $10 or $5 per stand [105], while those who buy

(continued...)

Several other features of the Ordinance are of significance. First, and most important, section 2 provides that it "shall be *unlawful* for any person to engage in or follow any vocation, occupation, calling or profession . . . without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession" (emphasis added). This language is not merely hortatory since under section 10(B), if a person "shall fail, neglect or refuse to pay a license fee as by this Ordinance required," such person "shall upon conviction be subject to punishment within the limits of and as provided by law for each offense," although, to date, no federal judge has ever been charged with a violation of section 10(B).

Second, if a licensee works both inside and outside the County, section 3 requires an apportionment to be made by the

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[2](...continued)
or sell horses, mules, jacks or jennets pay a fee of $20 for each county in which they operate [112]. Fortune tellers and others engaged in similar activities have to pay $40 [104], almost twice the highest rate that doctors and dentists [92] have to pay, but magicians get their licenses for $5 per year [119], the same fee charged veterinarians, but only after they have been in practice for two years [178]. Another apparently disfavored group (pawnbrokers) must pay $250 for their annual license [138]. And, unlike most licensees who pay a fixed annual fee, automobile storage garages pay at the rate of $2 per 1000 square feet up to 50,000 square feet, and then $1 per 1000 thereafter [55], while outdoor lots pay at half that rate [56]. Finally, although there is no specific exemption for ministers and other clergy, neither the State nor Jefferson County has attempted to license them.

licensee's employer or the licensee. Thus, because judges in the Northern District of Alabama frequently sit outside Jefferson County, they must either keep detailed time records reflecting where their compensation is "earned" in order to calculate their fee properly, or pay a higher fee than the law requires by assuming that all of their compensation is earned in Jefferson County.

Third, section 4 requires the employer to withhold the amounts due and pay them to the County, and section 7 gives the Director of Revenue the authority to audit the books and records of the employer and employee to determine whether the proper fee is being paid. No entity of the federal government, including the Administrative Office of the United States Courts, has ever withheld the amounts claimed by petitioner to be due from respondents or any other federal judge, nor have they filed any of the returns required by Ordinance 1120.

Respondents recognize that they are obligated to pay, and do in fact pay, income taxes to the State of Alabama, because those taxes are not imposed on a discriminatory basis. Their basic objection to the tax here is that it is not an income tax under either Alabama or federal law, but is instead, as the Ordinance itself proclaims, a license fee based on income, assessed by petitioner on respondents for the privilege of being a federal judge. Because a license is an imposition made on a federal function, the doctrine of inter-governmental immunity precludes petitioner from imposing such a requirement on respondents whose "license" to serve as federal judges comes from the United States, not Jefferson County. Moreover, the law discriminates against respondents by allowing others who hold licenses under Alabama law to avoid Ordinance 1120 entirely. Finally, respondents contend that the license charge is also an unconstitutional diminishment of their salaries, in

violation of Article III of the Constitution, particularly because it was imposed for the first time after they became federal judges.

2. Prior Proceedings

After the district court denied petitioner's motion to remand based on the claim that the federal courts were barred from hearing this action by the Tax Injunction Act, 28 U.S.C. § 1341, the case proceeded on cross-motions for summary judgment, including a stipulation of facts. The district court carefully analyzed the Ordinance and agreed with respondents that it was an unconstitutional license on the performance of a federal function and that it unconstitutionally diminished their salaries. Pet. App. 82-112.[3]

Petitioner appealed to the Eleventh Circuit, raising only issues on the merits. A divided panel reversed in an opinion written by Judge Birch. In the majority's view, the license fee was an income tax imposed on respondents, and as such it was entirely lawful. Chief Judge Tjoflat dissented, agreeing with the district court that the Ordinance was unconstitutional on both grounds urged.

Respondents were then granted rehearing *en banc*, and the full court, by a vote of 9-3, reversed the panel and sustained respondents' claim that the Ordinance imposed an

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[3] Following the ruling of the district court, the other federal judges who sit with respondents in Jefferson County ceased paying the license fee and have not paid it since then. *See* Brief *Amici Curiae* of Seven United States District Judges of the Northern District of Alabama Supporting Respondents.

unconstitutional direct tax on the exercise of the federal function of serving as an Article III judge. In the course of a thorough review of both constitutional doctrine and the statutes cited by petitioner to support its claim that the United States had consented to the imposition of this tax, the majority opinion, written by Judge Cox, focused on the substance of what the Ordinance did, and not on the labels attached to it. As the majority concluded, petitioner was "taxing a federal judge in the performance of his or her judicial duties [which] is fundamentally different from taxing his or her income." Pet. App. 49. They based their conclusion on both Alabama law and their own view of the operation of the statute, principally the portion which, in addition to imposing a tax, also made it "unlawful for a federal judge to perform his or her duties in Jefferson County without paying the privilege tax." *Id.* at 51. In reaching their conclusion, the majority stated that they had "no doubt that, under the Supremacy Clause, Jefferson County could not enjoin or otherwise prevent a federal judge from performing federal duties [and] that the Supremacy Clause protects the federal judiciary not only from outright obstruction but also from a requirement that a federal judge pay a fee to lawfully perform his or her duties." *Id.* at 51-52.

The court also considered and rejected petitioner's contentions that the Public Salary Tax Act, 4 U.S.C. § 111, and the Buck Act, 4 U.S.C. § 106(a), amounted to consents to impose the taxes here. As for the former, the majority reasoned that, while "Congress intended to consent to state taxation of federal employees' income to reciprocate for the imposition of the federal income tax on state employees, [Congress did] not consent to all state taxes on federal employees," in particular those "state taxes that in substance are not taxes on income." *Id.* at 56. With respect to the Buck Act, the court correctly noted that it "merely precludes a taxpayer from arguing that a

state or locality lacks jurisdiction to tax her because she resides in a federal area or receives income from transactions or services in a federal area," contentions that respondents have never made. *Id.* at 58, 60. In light of its conclusion that Congress did not consent to these taxes, the court found it unnecessary to reach the issue of whether the district court properly concluded that Article III would also invalidate Ordinance 1120, as applied to respondents. *Id.* at 35. Hence, that issue is not before the Court. Finally, because nine members of the *en banc* Eleventh Circuit had sat in Jefferson County within the last five years, and hence would, under petitioner's interpretation of Ordinance 1120, have to pay license fees for their time spent there, the court also addressed recusal and unanimously concluded that all of the judges could properly hear this appeal. *Id.* at 74-81.

Judges Birch and Henderson, who had comprised the panel majority, dissented, joined by Judge Anderson. *Id.* at 63-74. Their principal disagreement was over the proper characterization of the operation and effect of the Ordinance, which they believed are indistinguishable from those of an income tax, which everyone agreed could be lawfully imposed.

Jefferson County then filed a petition with this Court (No. 96-896) seeking review only on the merits. At the invitation of the Court, the Solicitor General filed a brief urging the Court to grant review because the decision below was allegedly incorrect and in conflict with the Third Circuit's decision in *United States v. City of Pittsburgh*, 757 F.2d 43 (1985), a case that the Eleventh Circuit majority had distinguished because of significant differences between the two ordinances. Pet. App. 56 n.19. The Solicitor General also suggested that the basis for removal under section 1442(a)(3) was unclear – an issue raised neither by petitioner nor by any of the thirteen judges who had considered the case – and suggested

that the Court might wish to have that issue briefed if review were granted.

On June 9, 1997, this Court granted review and summarily vacated and remanded the case for further consideration in light of *Arkansas v. Farm Credit Services*, 117 S. Ct. 1776 (1997), which had been handed down the previous week. At issue in *Farm Credit Services* was the applicability of the Tax Injunction Act in an action in which a government-created corporation had sued in federal court to invalidate a state tax, but to which the United States was not a party. This Court found the Tax Injunction Act was a bar in those circumstances, and its remand order in this case suggested that it might also be a bar here, although petitioner had not raised that Act in either the court of appeals or in its submissions in this Court.

The entire Eleventh Circuit reconvened, and in another carefully considered and detailed opinion for the majority, Judge Cox held that the Tax Injunction Act was inapplicable. Although rejecting the argument that the removal provision that conferred federal jurisdiction was alone sufficient to overcome the Act, the majority read the provision as evidence of congressional intent that officers of the United States, raising federal defenses tied to their positions as federal officers, should be able to litigate those federal defenses in federal court, even where the collection of state taxes was at stake, just as the United States could do in a similar situation. Pet. App. 21. As the court put it, "refusing to apply the exception in this case [because the Attorney General had not sided with the judges] would be equivalent to a finding that Congress intended to put the judicial branch at the mercy of the executive." *Id.* at 22.

The same three dissenters from the prior *en banc* decision dissented on remand, this time joined by Judge Carnes who, after reading the brief of the United States filed in this Court, changed his mind on the merits. *Id.* at 24. All of the dissenters except Judge Anderson would also have reversed under the Tax Injunction Act, but none of them agreed with the Solicitor General that there was any problem with the original removal under section 1442(a)(3). Petitioner then sought review in this Court, which was granted on December 7, 1998.[4]

SUMMARY OF ARGUMENT

1. The Tax Injunction Act did not oust the district court of jurisdiction in this case. The words of that Act, its admitted legislative purpose, and the cases construing it all

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[4] One other development is relevant. There is a certified class action in the Alabama state courts, in which classes of both federal and non-federal workers challenge Ordinance 1120 on grounds other than those raised here. *Richards v. Jefferson County*, Circuit Court of Jefferson County, Case No. CV-92-3191, Order Certifying Class dated May 14, 1997, on remand from *Richards v. Jefferson County*, 116 S. Ct. 1761 (1996) (reversing dismissal based on improper reliance on res judicata). On November 12, 1998, the trial judge entered an order finding Ordinance 1120 in violation of the Equal Protection Clause (Add. 1a-3a). Petitioner has been directed to report to the court on how it will remedy the situation. Respondents are advised that the Alabama legislature is considering an amendment to the Alabama statute that would alter the scheme that authorized petitioner to impose the fees at issue in this case and that may, depending on its final form, eliminate this controversy for the future, as *Richards* may have done for the past.

support the conclusion, joined by the Solicitor General, that the Act bars only "anticipatory relief" in the federal courts. *California v. Grace Brethren Church*, 457 U.S. 393, 409 (1982). Since this is a collection action brought by the taxing authority against respondents, and it reached federal court through the special removal provisions of 28 U.S.C. § 1442(a)(3), the Act does not apply, and the lower courts properly reached the merits.

Even if the Act applies, there is a judicially-recognized implied exception for actions brought by the United States or its agencies or instrumentalities. Where the Attorney General seeks relief from a state or local tax, or joins in the relief sought by an agency or instrumentality, the exception automatically applies. Where, as here, the United States does not join the persons or entities challenging the tax, the exception nonetheless applies where the challengers hold regulatory positions and, as the court of appeals correctly held here (Pet. App. 20), where they are members of another branch of government. Thus, it would be an affront to principles of separation of powers to allow the Attorney General to control the access of federal judges to federal courts where the challenge is to a state or local tax that would, if upheld, interfere with the ability of respondents to carry on their official duties.

The right of federal court access, notwithstanding the Tax Injunction Act, is fortified here because Congress has, through section 1442(a)(3), provided for a federal forum for federal judges who are sued in state court and who are defending the case on grounds of federal immunity. To allow the Tax Injunction Act to trump the removal provision would relegate federal judges to defend their offices, and to litigate their claims of federal immunity, in state courts, contrary to the expressed intent of Congress. Thus, at least where federal

judges are defendants in state court collection actions, and where their defense is based on a claim of federal immunity, the Tax Injunction Act does not create a barrier to having the district courts decide cases that are removed under section 1442(a)(3).

2. The court of appeals properly held that petitioner may not require Article III judges to pay a license fee for the privilege of carrying out their constitutional duties, even though the amount of the fee is tied to the earnings of the judge in Jefferson County. No one as yet has contended that an order from an Alabama court could constitutionally enjoin respondents from deciding cases assigned to them in the Northern District of Alabama because respondents did not first obtain a license from the County. Petitioner attempts to defend Ordinance 1120 on the ground that it is no more than a garden variety income tax, of the kind that this Court has held may be imposed on federal officers and employees by state and local governments, and to which Congress has consented in the Public Salary Tax Act, 4 U.S.C. § 111. All parties agree that the constitutionality of Ordinance 1120 does not depend on the label attached to the fees charged, but on whether those fees are properly categorized as income taxes, or whether they are, in effect, an attempt by the County to license federal judges.

Two aspects of Ordinance 1120 demonstrate that it is not an income tax of the kind approved by Congress and this Court. First, the Ordinance makes it "unlawful" for respondents and others to engage in their occupations without having paid the tax. Income tax laws do not forbid taxpayers from earning a living in order to pay their taxes; on the other hand, licensing laws routinely make it "unlawful" to engage in an activity without a license, as does Ordinance 1120. Indeed, because the fee must be paid when a person becomes "entitled" to

compensation, regardless of receipt, this further confirms that the fee is paid for a license, not as a form of income tax. Thus, unless respondents are willing to pay petitioner's fees, the only way that they can avoid the licensing requirement, and hence not violate the law, is to stop doing the jobs to which they have been constitutionally appointed – the hallmark of a licensing scheme.

Second, Ordinance 1120 completely excludes from its reach any person who obtains a license from the State of Alabama. This wholesale exemption applies regardless of how small a fee (if any) is paid for the other license, or what the relation of that fee is to the fee that would be charged by the County but for the exemption. If this fee were a true tax on income, the other fee would either be disregarded or a credit or deduction for it might be allowed in determining the amount owed to Jefferson County. But the total exemption here is inconsistent with any income tax scheme of which we are aware, although it is perfectly consistent with a system in which a person is required to have one and only one occupational license in a State.

The exemption for other licenses provides another reason why, even if the license fee could be considered an income tax, it would nonetheless be invalid. As this Court made clear in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), a tax that discriminates against federal workers is forbidden by both the Public Salary Tax Act and the inter-governmental tax immunity doctrine. Under *Davis*, discrimination includes not only singling out federal workers for less favorable treatment, but including federal workers – there, federal retirees – in the group that is treated less favorably, even if those receiving more favorable treatment – there, no taxation for retirees from state government – are only a small fraction of the entire group. That rationale fits this case like a glove since

federal judges are not, like most people in Jefferson County, licensed by the State, and thus must pay an occupational tax, but anyone who holds an Alabama state license of any kind is exempt. The fact that Alabama could not constitutionally license federal judges (and thereby exempt them from Ordinance 1120) does nothing to eliminate this unlawful discrimination. Accordingly, because the discrimination here is indistinguishable from that condemned in *Davis*, Ordinance 1120 can not be applied to respondents.

ARGUMENT

THE JUDGMENT SHOULD BE AFFIRMED.

I. THE DISTRICT COURT HAD JURISDICTION OVER THIS CASE.

This case began when petitioner filed suit in small claims court in Alabama, under state law, to collect the fees that it contends respondents owe. Because respondents are federal judges, and because they contend that petitioner is seeking to require them to have a license from Jefferson County in order to perform their official duties as district judges, respondents removed their cases to federal court under 28 U.S.C. § 1442(a)(3). That statute permits removal by "Any officer of the courts of the United States, for any Act [sic] under color of office or in the performance of his duties." Although the Solicitor General believes that removal was not proper under section 1442(a)(3) – an argument to which we respond *infra* at pp. 24-26 – petitioner never questioned the applicability of section 1442(a)(3), but instead based its argument opposing federal court jurisdiction on the Tax Injunction Act, 28 U.S.C. § 1341. The district court rejected that argument, as did the court of appeals on remand from this Court. As we now show,

there are two basic reasons why section 1341 did not preclude the district court from deciding this case.[5]

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[5] Petitioner did not raise section 1341 on its appeal to the Eleventh Circuit, nor in its first petition to this Court. Thus, unless the statute is "jurisdictional," the defense was waived. This Court has, without much discussion, treated section 1341 as non-waivable even where it was not argued below. *Arkansas v. Farm Credit Services*, 117 S. Ct. 1776, 1779-80 (1997). Other courts have gone so far as to conclude that even a statute that waived a state's immunity from suit under the Eleventh Amendment would not suffice to avoid section 1341. *United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323 (5th Cir. 1979); *City of Burbank v. State of Nevada*, 658 F.2d 708 (9th Cir. 1981); and *Kelly v. Springett*, 527 F.2d 1090 (9th Cir. 1975).

In our view, section 1341 presents no such impregnable barrier to federal court consideration of state and local tax cases. As is undisputed, the law was enacted to protect states from federal court litigation that would interrupt the collection of taxes. *Farm Credit Services*, *supra*, 117 S. Ct. at 1782. Given this rationale, there is no reason to believe that Congress would, in effect, want to protect states from themselves by making section 1341 non-waivable. Moreover, federal courts are plainly competent to decide these cases, given both the implied exceptions to section 1341, as well as the right of losing taxpayers to take federal questions arising in state tax cases to this Court. Furthermore, while the term "jurisdiction" was in the original version of what is now section 1341, *see Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943) (quoting original version), it was not included in the 1948 recodification of Title 28, with no explanation, and thus is no

(continued...)

A. *The Anti-Injunction Act Does Not Apply To Collection Actions Such As This.*

We begin with the language of section 1341: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The district court did not take, nor was it ever asked to take, any of the actions expressly prohibited by section 1341. Nor was it asked to issue a declaratory judgment, which this Court has found to be precluded by section 1341. *California v. Grace Brethren Church*, 457 U.S. 393 (1982). And this case does not involve an attempt, prohibited by *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981), to use 42 U.S.C. § 1983 to recover damages as a means of avoiding section 1341. In those actions, the taxpayer is the plaintiff seeking federal court "anticipatory relief." *Grace Brethren Church*, *supra*, 457 U.S. at 409. Here, by contrast, the persons who allegedly owe the taxes were state court defendants, and their federal case would produce the same kind of ruling that would have come from the state case: either they would be liable for the money or they would not. But in neither forum would an injunction or its functional equivalent be issued. In short, what was changed here by removal of this collection action was that the decisionmaker became a federal instead of a

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[5](...continued)
longer in what is now section 1341. Therefore, although respondents believe that petitioner's failure to raise the Tax Injunction Act in the court of appeals should constitute a waiver, we believe that the Court can and should find the Act inapplicable on other grounds.

state court, but the relief sought was unaffected.[6]

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[6] In this situation, the change was quite pronounced since, absent removal, this constitutional issue would have been tried in the first instance in the small claims section of the Alabama district court, which has exclusive jurisdiction over all cases where the amount in controversy does not exceed $3000. Ala. Code 12-12-31. District judges who hear those cases are elected for terms of six years, Ala. Code 12-17-65, under a system that was revised in 1988, but that still has no limits on the amount that any person (lawyer or client) can contribute to a judge's campaign. *See generally* Ala. Code 17-22A-1 to 17-22A-23. The complaint in small claims cases must be answered in 14 days, Small Claims Rule F, and only limited discovery is allowed. Ala. Rule of Civ. Proc. 26(dc). Alabama Small Claims Rule M allows judgments in small claims cases to be appealed to the circuit court within 14 days of the judgment, where there is a right to a de novo proceeding, including discovery and a new trial. Ala. Code 12-11-30(3). The losing party then has an additional right of appeal to the Court of Civil Appeals, Ala. Code 12-22-2 & 12-3-10. Review in the Alabama Supreme Court is by discretionary writ of certiorari, but only after the Court of Appeals has overruled an application for rehearing, and only if the petition to the Alabama Supreme Court, with an accompanying brief, is filed within 14 days after the denial of rehearing. Ala. Rule of App. Proc. 39(a) & (b). Thus, respondents would have had to proceed through four levels of state courts in Alabama before being able to seek review in this Court. The federal removal statutes were originally enacted "to protect federal officers from interference by hostile state courts," and one of their "primary purposes" was "to have [federal] defenses litigated in the federal courts. *Willingham v.*

(continued...)

The legislative history of section 1341, on which this Court has often relied (*see e.g., Grace Brethren, supra*, 457 U.S. at 409 n.22; *Great Lakes Dredge & Dock, supra*, 319 U.S. at 301), strongly supports the conclusion that this provision is intended to preclude only anticipatory actions and not defensive ones. The principal concern behind the bill was to prevent the federal courts from interfering with the ability of states to collect taxes, even on a temporary basis. The sponsors were very concerned about the ability of foreign corporations, using diversity jurisdiction, to go to federal court and either stop efforts to collect the taxes or force the states into settling for very low sums because they lacked the money to operate their governments until the cases could be decided. H. Rep. No. 1503, 75th Cong., 1st Sess. (1937) (making Senate report its own). *See also Perez v. Ledesma*, 401 U.S. 82, 127 n. 17 (1971) (Brennan, J., concurring). Indeed, in a legal brief that was attached to the House Report, the author indicated that the bill would *not* bar refund actions in federal court, even though the same issues would be decided that could not be decided in an action that came within the Tax Injunction Act. Unlike anticipatory suits for injunctions, where there is a substantial possibility of impairment of the revenue collection function, allowing this action to proceed in district court does not create any such problem.

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[6](...continued)

Morgan, 395 U.S. 405, 407 (1969). But surely along with those benefits come the right to have the case tried by an Article III judge and the right to litigate in the federal court system instead of whatever system a State may choose for its own cases.

This case does not raise any of those concerns (or even those that might be raised by a taxpayer's federal court suit for a refund) since Jefferson County apparently has used the best collection means available to it: a lawsuit in small claims court to collect the money that respondents allegedly owe. Apparently, Jefferson County is not sufficiently concerned about revenue loss to enact other mechanisms to assure that taxpayers pay first and only contest the tax afterwards. Thus, in this case, not only are the words of section 1341 inapplicable to the judgment entered by the district court here, but allowing this suit to remain in federal court does not offend any purpose underlying the Tax Injunction Act. It was in recognition of these principles that several lower courts have found no bar to district courts hearing actions, like this, seeking to collect state taxes. *Louisiana Land & Explor. Co. v. Pilot Petroleum Corp.*, 900 F.2d 816, 818 (5th Cir.), *cert. denied sub. nom. Alabama Dept. of Rev. v. Pilot Petroleum Corp.*, 498 U.S. 897 (1990); *Arizona v. Atchison Top. & St. Fe. Rail. Co.*, 656 F.2d 398, 402 (9th Cir. 1981); *Hargrave v. McKinney*, 413 F.2d 320 (5th Cir. 1969), *vacated and remanded on other grounds sub. nom. Askew v. Hargrave*, 401 U.S. 476 (1971). *Contra Keleher v. New England Tel. & Tel. Co.*, 947 F.2d 547 (2d Cir. 1991). It is on this basis that the Solicitor General agrees with respondents and the Eleventh Circuit that the Tax Injunction Act does not require a remand to state court here. U.S. Br. at 15-17.

B. *The Implied Exemption For The United States And Its Instrumentalities, Together With Section 1442(a)(3), Entitled Respondents To Remove And Retain This Action In Federal District Court.*

Although the language of section 1341 is absolute, the

courts have recognized several exceptions, the most relevant being for the United States and its instrumentalities. If an exception applies, it allows suits to be filed in federal district court that actually seek an injunction against the collection of state taxes – precisely what section 1341 literally proscribes. The basis for this implied "judicial exception" (*Farm Credit Services, supra* 117 S. Ct. at 1778), which does not appear in section 1341 or any other specific cross-referenced provision, is the need for "the United States to protect itself and its instrumentalities from unconstitutional state exactions." *Department of Employment v. United States*, 385 U.S. 355, 358 (1966) (exception invoked to protect tax-exempt status of Red Cross). In this case, respondents' claim on the merits is that petitioner's Ordinance is a direct interference with the federal judicial function, just as if petitioner sought to close down the federal courts if respondents and the other federal judges did not pay the County's license fees. Indeed, since this suit is not really about money, and respondents would be objecting to this scheme if the license fee were only $1 per year, this case is arguably not within the Tax Injunction Act at all. Analyzed under these rationales, respondents' defenses here would, in our view, have entitled them to bring their own affirmative action to test the constitutionality of Ordinance 1120, notwithstanding the Tax Injunction Act.

But respondents do not ask the Court to reject the applicability of section 1341 on that basis since there is a narrower ground on which the Act can be avoided. This case entered the federal courts via the special statute, 28 U.S.C. § 1442, that allows federal officers who are sued over their official duties to remove those suits to federal court so that federal and not state judges will pass on their defense that federal law permits them to do what state law allegedly forbids. *Mesa v. California*, 489 U.S. 121 (1989); *Gay v. Ruff*, 292 U.S. 25, 33

(1934) (removal needed in cases where state charges federal official with conduct that federal law requires). In its second *en banc* decision, the Eleventh Circuit declined to hold that section 1442(a)(3) alone overrode the Tax Injunction Act, but it did find that it embodied a congressional policy that federal judges should have the right to have their claims of federal immunity decided by federal courts. Pet. App. 21-22. Therefore, it concluded, the implied exception for the United States and its instrumentalities applied to this case.

Relying on this Court's decision in *Arkansas v. Farm Credit Services*, 117 S. Ct. 1776 (1997), petitioner had argued that, since the United States, acting through the Attorney General, had not joined in the defense, and in fact disagreed with respondents on the merits, the exception did not apply. The court of appeals quite properly rejected that argument, recognizing the grave separation of powers problems that would ensue by putting federal judges "at the mercy of the executive" by allowing the Attorney General to control the access of members of the Judicial Branch to federal court. Pet. App. 22. In reaching that result, it further relied on the congressional policy embodied in section 1442(a)(3) – to provide for federal court access for all officers of the federal courts, whenever they are sued over their official conduct, as they were here, with no requirement that the Attorney General join in the removal petition. *Compare* 28 U.S.C. § 2679(d)(2)(allowing suits against federal employees in state court to be removed to federal court "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose . . ."). Accordingly, the implied exception for suits involving the United States and its instrumentalities extends at least as far as to cover cases removed by Article III judges pursuant to section 1442(a)(3).

There are two possible responses to this argument, neither of which is on target. First, *Farm Credit Services* could be construed to make the exception for instrumentalities of the United States depend entirely on whether the Attorney General supported the federal officer seeking access to federal court, even in situations such as this where drawing that line would raise significant separation of powers concerns. But such a broad reading of *Farm Credit Services* can not be justified. The entity at issue in *Farm Credit Services* was not one of the three branches of government, it did not have any regulatory responsibilities, and it was not staffed by officers of the United States, appointed under the Appointments Clause. Rather, it was under the general control of one sub-unit within the executive branch, the Farm Credit Administration. Indeed, the entity bringing suit there was a private corporation that performed private functions, but was imbued with certain governmental characteristics. Under those circumstances it makes eminent sense to assume that Congress wanted to allow such entities to overcome the Tax Injunction Act only with the support of the Attorney General. However, *Farm Credit Services* says nothing about the very different situation here where respondents are the direct instrumentalities of one of the three branches of the federal government in the Northern District of Alabama. As the opinion in *Farm Credit Services* recognized, the Court must also consider the "other side of the federal balance" in deciding how far the exemption applies, 117 S. Ct. at 1780, and here, unlike in *Farm Credit Services*, that other side tips the scales decidedly in favor of an implied exception to the Tax Injunction Act.[7]

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[7] If *Farm Credit Services* is that sweeping an opinion, it would also call into question decisions such as *Federal Reserve*

(continued...)

The second objection to reliance on section 1442(a)(3) is raised by the United States only. Although it agrees with respondents that this case is not covered by the Tax Injunction Act at all, it takes the position that, if that Act applies, respondents cannot rely on section 1442(a)(3) to overcome it since they improperly relied on that provision. According to the Solicitor General, the tax at issue here is a garden-variety income tax to which the United States, by the passage of specific legislation, has consented to its imposition on all officers

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[7](...continued)
Bank of Boston v. Commissioner of Corporations & Taxation, 499 F.2d 60 (1st Cir. 1974), in which the exception for the United States and its instrumentalities was applied to cover the Federal Reserve Bank of Boston in its dispute over whether Massachusetts could tax the materials used to construct a new building. Part of the rationale there, and in *Carrolton-Farmers Branch v. Johnson & Cravens*, 889 F.2d 571 (5th Cir. 1989), *vacating and modifying*, 858 F.2d 1010 (1988), which involved the Federal Savings and Loan Insurance Corporation, was the existence of other statutes allowing those entities to sue and be sued in the federal court, provisions that are comparable to the right to remove under section 1442(a)(3) at issue here. The rationale in those cases is also similar to that relied on in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), where this Court rejected the argument that Indian tribes were instrumentalities of the United States, and hence exempt from section 1341, but allowed them to remain in district court based on a specific jurisdictional statute, 28 U.S.C. § 1362, allowing tribes to sue in federal court. Indeed, the Court in *Farm Credit Services* noted both the *Federal Reserve* and *Moe* decisions (117 S. Ct. at 1782 & 1781), and gave no hint that it disapproved of them.

and employees, including federal judges. Therefore, since the tax is being imposed on respondents in their personal, not official, capacities, the case was not properly removed under section 1442(a)(3).

The Solicitor General's brief filed in this Court when certiorari was first sought set forth his position respecting section 1442(a)(3). That brief was submitted by petitioner to the Eleventh Circuit on remand, but not one of the twelve judges who considered the argument found it meritorious. And for good reason: it conflates the merits with removal. Thus, the Solicitor General begins by concluding that respondents are mistaken that they have a federal defense to the payments required by Ordinance 1120, and then uses that conclusion to deny them the right to have the federal court decide whether that conclusion is correct.

But as the cases make clear, *e.g.*, *Jamison v. Willey*, 14 F.3d 222, 238-39 (4th Cir. 1994), the purpose of 28 U.S.C. § 1442 – not just the portion dealing with judges, but the other parts that cover legislators and members of the Executive Branch – is to assure that federal claims and defenses can be decided by federal, not state, courts. This Court's decision in *Mesa v. California*, 489 U.S. 121 (1989), holds that a person's status as a federal officer is not enough to permit removal under section 1442. Rather, the official must also claim a federal immunity of some kind to be able to gain access to a federal court. But the fact that a defendant must raise a federal defense to make section 1442 applicable does not mean that, as part of the decision on whether removal is proper, the district court must *decide* whether the defendant prevails on the immunity claim. *See also Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 474 n.13 (1976) (contrasting standing or capacity to sue with prevailing on the claim).

The need to have the issue of federal immunity decided by a federal judge is the reason for allowing removal in the first place. And yet, according to the Solicitor General (Br. 19-20), the district court must rule on the immunity issue when removal is sought, prior to any discovery or even any pleadings or legal briefing directed to that question. Nothing in section 1442 or the cases interpreting it permits, let alone requires, such an illogical result. As this Court observed in *Willingham*, *supra*, 395 U.S. at 407: "The officer need not win his case before he can have it removed." Respondents or others who invoke section 1442 may not prevail on the merits, but that no more defeats federal court jurisdiction here than did a similar failure to separate the merits from jurisdiction in the famous case of *Bell v. Hood*, 327 U.S. 627 (1946). And, in any event, as we now demonstrate, respondents are correct in their claims on the merits.[8]

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[8] Federal courts have recently considered a similar issue when removal is obtained under section 1442 in tort suits against federal employees who claim they were acting within the scope of their authority when they committed the alleged tort. If it is determined either by the court or the Attorney General that the conduct was not in the course of the employee's duties, the court must decide whether the case is to be remanded because the United States is no longer a party. In *Garcia v. United States*, 88 F.3d 318, 326 (5th Cir. 1996), the court of appeals directed that the case be retained in the federal court, relying for its conclusion on the brief of the United States, which took the position that if "a federal defense supports removal jurisdiction, the rejection of the defense does not divest a federal court's jurisdiction over the removed action."

II. ORDINANCE 1120 IS UNCONSTITUTIONAL.

In assessing the constitutionality of Ordinance 1120, it may be useful to begin with points on which we believe there is agreement. First, if the Ordinance imposed a true tax on respondents' income, whether based on all income or just on earned income, respondents would have no basis for objecting to it. That would be true no matter whether the tax is called a license fee or an occupational privilege tax, and even if it is clear (as it is in Alabama) that the taxing authority has no power to impose what is called an "income tax" under State law. That is because this Court has held that federal officials have no constitutional right to object to such a tax, *Graves v. New York ex rel O'Keefe*, 306 U.S. 466 (1939), and because Congress has specifically consented to such taxes in the Public Salary Tax Act of 1939, 4 U.S.C. § 111. For these reasons, respondents have always paid Alabama's income tax, even after becoming federal judges.

On the other hand, if petitioner actually sought to require respondents to obtain a license as a condition of performing their duties as Article III judges, there is no question that such interference would be forbidden by the Constitution. *Johnson v. Maryland*, 254 U.S. 51 (1920) (State cannot require postal driver to have State driver's license to drive federal vehicle). Respondents and all other Article III judges receive their "license" to serve when they are nominated by the President and confirmed by the Senate in accordance with the Appointments Clause of the Constitution, Article II, section 2, clause 2. The clearest case of an unconstitutional interference would be one in which petitioner sought to enjoin respondents from deciding cases pending before them until they had obtained a license from the County, much as the Alabama bar can seek to enjoin a person who does not have a license from the Alabama

Supreme Court from practicing law in the State. The interference would be even greater if petitioner brought criminal charges against a federal judge for not obtaining permission to decide cases, but surely no court would insist upon that happening before deciding that petitioner had overstepped its constitutional authority. Moreover, the result would be the same regardless of the size of any license fee that petitioner might charge, or even if there were no fee at all, because the County may not set any conditions on the right to engage in federal functions.

We assume that petitioner and the United States would also agree that, if the license fee at issue in this case were a fixed amount per year, unrelated to respondents' compensation, such an arrangement would be forbidden because it is surely not an "income tax" as that term was used in *Graves* or is used in the Public Salary Tax Act. And it would not matter whether the fee were set at the same $668 per year maximum for a federal judge who works only in Jefferson County during the year, or were $250 (the annual license fee for members of the Alabama bar), $10 (the current annual license fee for embalmers, Pet. App. 170), or even $1. Moreover, that law would be unconstitutional even if it were perfectly clear that Jefferson County lacked authority to seek an injunction against persons who did not have a license, and there were no criminal sanctions of any kind for non-payment.

A. *Ordinance 1120 Is A Licensing Not An Income Tax Law.*

This case differs from the foregoing hypotheticals only because the fee here is not fixed, but is based on what respondents receive or are entitled to receive as federal judges from work performed in Jefferson County. It is respondents'

position that there is no constitutional difference between those cases and this one, principally because of two features in Ordinance 1120.

First, section 2 makes it "unlawful for any person to engage in or follow any vocation . . . without paying license fees to the County for the privilege of engaging in or following such vocation . . ." Under this provision, according to petitioner, respondents violate the law of Jefferson County every day that they perform their duties as Article III judges without having paid the requisite license fees. Much as the Solicitor General would like to rewrite Ordinance 1120, it does not simply make it "unlawful" not to pay the fees imposed by it. Br. 25-26. Rather, Ordinance 1120 makes it "unlawful" for anyone to work without paying the fees, with the result that, as the majority observed below (Pet. App. 46), "the tax purports to be a precondition to the lawful performance of [respondents'] federal judicial duties." Moreover, respondents have taken an oath to uphold all the laws of the United States, and almost daily they are required to interpret and enforce the laws of Alabama, under which Ordinance 1120 is authorized. Therefore, whatever others may do, respondents consider it a matter of principle that they not be branded as "lawbreakers" because they do not agree that Jefferson County may license them.

Moreover, to our knowledge, federal income tax laws never make it "unlawful" to engage in any vocation, although other laws may prohibit such activities. Indeed, as Al Capone found out, federal tax laws make it unlawful to fail to pay taxes on all earnings, lawful or otherwise. But this Ordinance is being defended on the ground that it is an income tax law, and this highly unusual "unlawfulness" feature casts considerable doubt on the correctness of that defense, especially since the proper characterization of Ordinance 1120 for this case is a matter of

federal not state law. *Howard v. Commissioners of the Sinking Fund of Louisville*, 344 U.S. 624, 628 (1953). Furthermore, it would be perverse for an income tax law to forbid someone from earning a living as the price of not paying one's taxes since that is the primary means by which most people are able to pay their income tax liabilities, past or present.

There is another aspect of the statute that further confirms the conclusion that Ordinance 1120 makes it unlawful not to have a license, not just not pay the fee alleged to be due. Under section 1(F) (Pet. App. 131), the compensation on which the fee is based includes not only compensation received, but that which respondents are "entitled to receive from [their] employer." As the district court recognized (*id.* at 106 n.14), and the majority of the court of appeals specifically relied on in finding the fee to be a condition of work, not a tax on respondents' salary (*id.* at 46), the payment to petitioner is due once the work is performed, even if the pay is never received, making it comparable to a license fee for an Alabama attorney who pays $250 bar dues at the beginning of the year and gets no rebate even if he or she never earns a dollar that year. Accordingly, because Jefferson County has chosen to make it unlawful for respondents to work as federal judges without paying the required fees, Ordinance 1120 is not an income tax statute, which is constitutional, but a licensing provision, which can not constitutionally be applied to respondents.[9]

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[9] In the district court, respondents stipulated that all federal district judges in the Northern District of Alabama except respondent Acker paid the occupational tax of the City of Birmingham and that respondent Clemon paid it on approximately 66 percent of his earnings as a federal judge. Pet. (continued...)

Second, there is a broad exemption in Ordinance 1120 (mandated by section 4 of the authorizing legislation, Alabama Act No. 406, Pet. App. 127) that excludes from the licensing requirement any person who is otherwise licensed by the State or the county. *See* Section 1(B) (definition of vocation etc) (Pet. App. 130). It is not just doctors, lawyers, and a few other occupations and professions that are licensed, but, as noted above (p. 4) there are approximately 140 exemptions from petitioner's ordinance.

These exclusions are important for several related reasons. Initially, and most obviously, they underscore that this is a licensing scheme, not an income tax law because the exclusions are based on licensure, not on a lack of income, or income from sources (such as dividends or interest) not covered by the Ordinance. Thus, if a person working in Jefferson County has another license, that person is exempt from this licensing arrangement, regardless of how much, or how little, the person pays for that other license when compared to what he or she would pay under Ordinance 1120. As the majority below put it, "[w]e do not understand why, if the ordinance is an

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[9](...continued)
App. 115-16. Although the record does not reflect this fact, after this lawsuit was filed, respondent Clemon reviewed the Birmingham Ordinance and, upon discovering that it too contains similar "unlawful" language, directed the Administrative Office of the United States courts to cease withholding the tax from his salary. For the convenience of the Court, a copy of the current law, Birmingham Ordinance 97-184, December 23, 1997, which became effective on January 1, 1998, is being lodged with the Clerk and provided to petitioner and the United States.

income tax, it exempts from its requirement persons paying license fees to Jefferson County or to the State of Alabama, license fees that are totally unrelated to income." Pet. App. 46.

If Ordinance 1120 were a true income tax provision, it would handle the matter of other licenses in one of two ways: it could simply disregard whatever license fee is paid to another unit of government, or it could make an adjustment on account of that other payment. The first alternative is the one chosen by the City of Birmingham in its occupational tax. Although petitioner proclaims on several occasions (Br. 21, 25-26 n.9 & 34) that the City's ordinance and Ordinance 1120 are "identical," that is incorrect since the City has *no* exemption for those who pay license fees to the State or county. While the City taxes only earnings and not income such as dividends, interest, and capital gains, it is otherwise like the federal income tax and is fundamentally different from Ordinance 1120 because the City does not exempt persons who are otherwise licensed.[10]

The other alternative approach, which would be in keeping with most income taxes, would be to make some type of adjustment because of the license fees paid to other jurisdictions. Such an adjustment is not constitutionally mandated, but it would be permissible, and would lessen the impact of eliminating this exemption entirely. For example, the County could allow a dollar-for-dollar credit for license fees

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[10] Alabama's state income tax is also broad-based and has no exemption scheme like Ordinance 1120. Thus, the tax is owed by "[e]very individual residing in Alabama" and "[e]very nonresident individual receiving taxable income from property owned or business transacted in Alabama." Ala. Code 40-18-2(1) & (6).

paid to other jurisdictions, so that lawyers practicing in Jefferson County, and earning the same amount as federal judges, would pay $250 in bar dues, and then subtract that amount from the $668 that they would otherwise owe the County. Or, the County could allow a bar member to deduct the $250 from his gross income, but that would reduce the payment to the County by only $1.25 (1/2% of $250). It might be that, either because the State's license fees were very high, or because the individual did not earn much money, no tax would be owed to the County, but that result would not be due to a wholesale exemption for those who are otherwise licensed by the State, regardless of how little they pay in State license fees.

It is not so much the inequity of allowing some persons who pay as little as $5 per year to escape petitioner's licensing fees, no matter how much they earn, that makes Ordinance 1120 unconstitutional as applied to respondents. Rather, the exemption for other licenses makes clear, far beyond the name given to these fees and the other attributes of Ordinance 1120, that the program that it establishes is truly a licensing, not an income tax, scheme, and, therefore, Jefferson County may not constitutionally apply it to respondents.[11]

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[11] Respondents also believe that, because of this inequity, the Ordinance violates the Equal Protection Clause, as held by the Circuit Court in *Richards*, *supra*, note 4, although that claim was not made in this case. In addition, the district court correctly ruled that, because Ordinance 1120 was not passed until 1987, after both respondents were already federal judges, it was an unconstitutional diminution of their salaries, in violation of Article III. Pet. App. 105-111. Since the *en banc* court of appeals did not reach that issue (*id.* at 35), and it was

(continued...)

B. *Ordinance 1120 Unlawfully Discriminates Against Respondents.*

There is another reason why this wholesale exemption makes Ordinance 1120 unconstitutional: it creates a discrimination that the Constitution and the Public Salary Tax Act forbid. The discrimination argument was raised, but rejected, in the district court (Pet. App. 89-90), and appears to have been abandoned, if not rejected in the court of appeals, including by those judges who agreed with respondents (Pet. App. 34 n.9). And when undersigned counsel of record entered this case when review was sought in this Court in 1998, no claim of discrimination was raised in the brief in opposition. Nonetheless, there is no barrier to this Court's considering the argument since it is no more than an alternative ground, using the same legal principles, for affirming the judgment below; the facts relating to it are all stipulated and have been the focus of much of the litigation; and the case on which it is based – *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989) – is relied on heavily in the briefs of both petitioner and the United States. Most significant of all, petitioner's merits brief argues (at 33-35) that, because federal and state judges are treated alike, there is no discrimination, and hence Ordinance 1120 is valid.

The Public Salary Tax Act permits a state or political subdivision thereof to tax the "pay or compensation" of a federal officer or employee "if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U.S.C. § 411. Thus, section 411 would plainly bar a tax that applied a higher rate to federal-source

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[11](...continued)
not presented in the petition, it too is not before the Court.

income than to all other forms of income, or denied federal employees deductions that were available to others, or exempted state judges from a tax while taxing members of the federal judiciary. Although Ordinance 1120 does not single out federal employees for unfavorable treatment, it nonetheless discriminates in a manner that violates the holding of *Davis*.

In *Davis*, this Court held, with only Justice Stevens dissenting, that section 111 and the constitutional inter-governmental tax immunity principles on which it is based extend beyond prohibiting facial discrimination against federal workers. Under Michigan law, retirement payments for federal workers were treated the same as payments for retirees who worked for private employers; the only discrimination was in favor of state employees whose retirement benefits were not taxed. Despite the fact that federal workers were not singled out for unfavorable treatment, the *Davis* Court held that the anti-discrimination provisions of section 111 (and the constitutional principles that it embodies) applied. *Id.* at 813.

After noting that the standard of review under section 111 was less rigorous than under the Equal Protection Clause (*id.* at 816), the Court concluded that there was discrimination and that the reasons offered by the State did not justify the favored treatment for state retirees. The State had argued that the exclusion for state retirement benefits was appropriate because, on average, state employees received lower retirement benefits than did federal workers. *Id.* at 816-17. However, this Court ruled that more carefully tailored means were available to protect state employees who received smaller payments, without favoring those whose retirement pay exceeded that of federal workers. *Id.* Should petitioner seek to defend the discrimination caused by the total exclusion from Ordinance 1120 of those who pay license fees to the State, the answer is

the same: there are less discriminatory alternatives that take into account payments made for other licenses without creating a wholesale exemption.

Nor can it be argued that the Court in *Davis* failed to focus on how expansive a definition of discrimination it was creating. In his dissent, Justice Stevens pointed out that the Michigan law applied to 4.5 million people, of whom only 24,000 were federal and 130,000 were state retirees. *Id.* at 821. He further argued that section 411 was not a "most favored nation provision" (*id.* at 823), and that, since the same result could be achieved by increasing the size of state pensions, there was no reason to strike down this arrangement. *Id.* at 824. Petitioner's claim that, because there is parity of treatment between federal and state judges, Ordinance 1120 satisfies section 411, might well have survived under Justice Stevens' view, but it is surely inconsistent with the holding in *Davis*.

Finally, in contrast to its position here, the United States urged the Court to hold that the statute in *Davis* created an unlawful discrimination for essentially the reasons relied on by the majority. The Solicitor General's brief of September 1, 1998 (a copy of which is being provided to petitioner's counsel) specifically rejected the notion that, if retirees other than federal workers also received less favorable treatment, the discrimination did not offend section 111 or the constitutional immunity doctrines on which it is based. It further argued against the justifications offered by the State there, yet it supports the County here.

The only possible explanation for this radical change in the Government's position is that its brief here never mentions the wholesale exemptions for holders of state licenses, let alone analyzes their impact on the issue of discrimination (or on the

issue of whether the fees imposed are an income tax or constitute an unlawful attempt at licensure). In any event, whatever the reason may be for its change in heart, the Court should reject the arguments of the Solicitor General and find that Ordinance 1120 unlawfully discriminates against respondents.

C. *The Other Arguments Raised In Defense Of Ordinance 1120 Are Of No Avail.*

The Buck Act, 4 U.S.C. §§ 106 *et seq*, which is heavily relied on by petitioner and the United States, also does not provide a defense for Ordinance 1120. Unlike the Public Salary Tax Act, which preceded the Buck Act by a year, the Buck Act is not an affirmative grant of power to the states (or a consent by the United States) to impose any tax. Rather, it does no more than remove a defense that might be raised if a state sought to tax the income of a person who works on a federal enclave that is part of a state or locality. Thus, as a complement to the Public Salary Tax Act, Congress provided that "No person shall be *relieved* from liability for any income tax levied by any State . . . by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area . . ." (emphasis added). But unless the tax is an income tax, the Buck Act is wholly irrelevant.[12]

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[12] Nor does the broad definition of income tax in 4 U.S.C. § 110(c), which includes taxes that are "measured by . . . gross receipts," help petitioner. That definition, by its terms, is limited to "sections 105-109 of this title," which includes the Buck Act (section 106), but it does not include the Public Salary Tax Act (section 111), the only statute that permits a tax to be imposed.

In relying on the Buck Act, petitioners and the United States cite *Howard v. Commissioner of the Sinking Fund of Louisville*, 344 U.S. 624 (1953), and *United States v. City of Pittsburgh*, 757 F.2d 43 (3rd Cir. 1985). However, neither is of any help because the statutes in both cases are readily distinguishable on both of the grounds relied on by respondents. The statute in *Howard* is reproduced in note 2 of the opinion, and it does not, unlike Ordinance 1120, contain any provision making it "unlawful" to work without paying the tax that it imposes, nor are there are exclusions from it for those who pay other occupational license fees. Thus, contrary to the argument of the dissent below (Pet. App. 62) and of petitioner (Br. 37), the statute in *Howard* is neither "almost identically worded" to Ordinance 1120, nor "indistinguishable" from it. Furthermore, in contrast to this case, the taxpayers' principal argument in *Howard* was that, because the tax could not, as a matter of Kentucky law, be an income tax, it could not qualify for the benefits of the Buck Act. 344 U.S. at 628. Having rejected that argument, and in the absence of any other basis to challenge the categorization of the tax for Buck Act purposes as an income tax, the Court sustained the City's claims.

In *City of Pittsburgh*, the statute is not reproduced in the opinion, but its description is of a routine gross receipts tax, labelled a business privilege tax, that was applied to the sales of transcripts by a court reporter who worked for the federal court. There appears to have been no attempt by the City to "license" federal court reporters (who are employed by the federal government), nor to make it "unlawful" to fail to pay the tax. Finally, there were no exemptions for others who sold transcripts (either for private sector or public employees) of the kind involved here. Accordingly, given the significant differences between Ordinance 1120 and the statutes at issue in *Howard* and *City of Pittsburgh*, neither of those cases can

rescue petitioner.[13]

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For all these reasons, the license fee imposed by Ordinance 1120 is not an income or other tax permitted by the Public Salary Tax Act or the Constitution. Rather, it is an attempt by Jefferson County to license federal judges as a condition of their performing their federal duties, and no Act of Congress, nor any decision of this Court, allows that to be done. Jefferson County is not powerless to raise revenues from those who work there, including federal officers and employees, but it cannot do so if it makes it unlawful to carry out the duties of a federal judge without paying a license fee, or if it continues to grant a wholesale exemption to those who hold licenses from the State of Alabama. Because the taxes that petitioner seeks to collect in this case are based on a law that contains these

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[13] Petitioner, but not the United States, also relies on 5 U.S.C. § 5520, and the regulations promulgated thereunder (Br. 30-32). Those provisions require the Secretary of the Treasury to enter into agreements for withholding certain taxes from the pay of federal officers and employees (including those in the judicial branch, for whom withholding is handled by the Administrative Office of the United States Courts). But petitioner stipulated in the district court that no such withholding has ever been made under Ordinance 1120 (Pet. App. 114, ¶ 10), which strongly suggests that no Secretary of the Treasury, nor anyone in the Administrative Office, has ever considered the license fee imposed by Ordinance 1120 to fall within section 5520. We do not contend that this fact is dispositive, but it does make it difficult to see how section 5520 helps petitioner.

constitutional defects, the County cannot prevail.

CONCLUSION

The judgment below should be affirmed.

Respectfully Submitted,

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February 22, 1999

Addendum

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JASON RICHARDS, et al.,

PLAINTIFFS,

VS.

JEFFERSON COUNTY, et al.,

DEFENDANTS.

CASE NO. CV-92-3191

JUDGMENT

The Court has considered the evidence, argument and pleadings in this matter, along with the applicable statutes, ordinance and caselaw. After a consideration of same, the Court finds that Section 4 of Alabama Act 406(1967), and Section 1(B) of Jefferson County Ordinance 1120 (1987), are unconstitutionally violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, for the following reasons:

1) Fairness is the notion underlying the concept of equal protection, and, as such, fairness must be examined when considering how a government treats its citizens. The unfair application of the County's occupational tax violates the rights of wage earners and certain select professionals by unfairly subjecting them to an employment tax while allowing other occupations to be exempt from the tax by paying a nominal yearly license fee.

2) The ordinance and statute in question each contain vague definitions which lead to subjective interpretations and inconsistent enforcement of the tax.

3) Many taxpayers pay a license fee and also pay an occupational tax, which is in direct conflict with Act 406.

4) The exemptions established by the statute and ordinance unjustly and unreasonably create a class of taxpayers who must bear the sole burden of providing occupational tax dollars for the County.

5) The exemptions are arbitrary, unfair and irrational.

Accordingly, it is hereby Ordered as follows:

(a) Defendant's motion to dismiss for want of jurisdiction is denied.

(b) The Jefferson County Commission shall have until January 15, 1999, to seek the removal of the unconstitutional exemptions from Ordinance 1120 through proposed legislation or to remove the occupational tax altogether. A hearing is set for January 19, 1999, at 10:00 a.m., at the Jefferson County Courthouse to determine if there has been compliance with the Court's order. The Court will also determine any proper injunctive relief required for compliance.

(c) A hearing is set for June 16, 1999, at 10:00 a.m. at the Jefferson County Courthouse for the Court to determine if the Alabama legislature has remedied Act 406, and if there has been corresponding action by the Jefferson County Commission with regard to Jefferson County Ordinance 1120.

(d) At the compliance hearing of June 16, 1999, the Court shall determine what amount, if any, should be refunded the class and subclass members. The Court shall also consider the issue of plaintiff's attorney's fees. The Court may also determine further injunctive relief.

(e) After January 19, 1999, there will be a separate order entered by this Court regarding the class and subclass members.

(f) The Court refrains jurisdiction of this matter.

Done and Ordered this 12th day of November, 1998.

/s/ John E. Rochester
JOHN E. ROCHESTER
CIRCUIT JUDGE, SPECIALLY SITTING